

1984

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Recommended Citation

Catherine L. Ansari, *Limiting Spillover and Foreclosure Through Title III of the Export Trading Company Act of 1982*, 52 Fordham L. Rev. 1300 (1984).

Available at: <https://ir.lawnet.fordham.edu/flr/vol52/iss6/31>

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LIMITING SPILLOVER AND FORECLOSURE THROUGH TITLE III OF THE EXPORT TRADING COMPANY ACT OF 1982

INTRODUCTION

The United States export market is critical to the domestic economy.¹ When exports lag behind imports, inflation increases domestically² and the value of the dollar declines internationally.³ Currently, thousands of American businesses produce exportable goods, but are unable to compete with foreign companies in international markets.⁴ Historically, business has contended that the underlying reason for the problems of American exporters in international markets is the uncertain jurisdictional scope of United States antitrust law.⁵ Businesses engaging in export activities face numerous antitrust problems. For example, if several manufacturers want to export products jointly to

1. See 15 U.S.C. § 4001(a) (1982). Exports create and maintain "one out of every nine manufacturing jobs in the United States and . . . generat[e] one out of every seven dollars of total United States goods produced." *Id.* § 4001(a)(1); see H.R. Rep. No. 924, 97th Cong. 2d Sess. 2 (Conf. Report 1982) [hereinafter cited as Conference Report]; 128 Cong. Rec. H8460 (daily ed. Oct. 1, 1982) (statement of Rep. Bingham).

2. 15 U.S.C. § 4001(a)(3) (1982).

3. *Id.* The ratio of exports to GNP rose from 4.2% in 1972 to 7.5% in 1979; however, United States imports increased in importance relative to the GNP from 5.1% to 8.7% in the same years. S. Rep. No. 27, 97th Cong., 1st Sess. 4 (1981) [hereinafter cited as Senate Report]. The trade deficit has expanded dramatically with an aggregate deficit over the past five years exceeding \$140 billion. *Id.*

4. See 15 U.S.C. § 4001(a)(4) (1982). One of the primary reasons for the inability of American exporters to compete successfully against foreign competitors is that they "do not have sufficient expertise to penetrate the wide variety of foreign markets." 128 Cong. Rec. H8461 (daily ed. Oct. 1, 1982) (statement of Rep. Bingham). Export trading companies "can provide a real service to American manufacturers and distributors who are not otherwise able fully to explore and meet foreign market demands." *Id.*

5. See Senate Report, *supra* note 3, at 7 (lack of American exports is due to the lack of clear-cut antitrust immunity for export activity); International Economic Affairs Department, National Association of Manufacturers, The International Implications of U.S. Antitrust Laws 4 (1974) (70% of firms reporting claimed that United States antitrust policy decreased their ability to compete against foreign competitors).

The Second Circuit, in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), analyzed the jurisdictional scope of United States antitrust law in terms of an "effects" test: foreign conduct that is intended to affect United States commerce, and does so, comes within the purview of United States antitrust law. *Id.* at 443-44. Federal courts subsequently have modified this test in various ways. For example, jurisdiction has been found when conduct has "a substantial effect on American foreign commerce," *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979), "directly affect[s] the flow of foreign commerce into or out of the country," *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa.), *modified on other grounds*, 383 F. Supp. 586 (E.D. Pa.

foreign markets and to exchange information for this purpose, the exchange of information may be considered an antitrust violation because it could affect domestic prices—a spillover effect.⁶ Additionally, if an American exporter appoints an exclusive foreign distributor, this exclusivity agreement may be considered an antitrust violation because it could foreclose the export opportunities of other domestic competitors—a foreclosure effect.⁷ In 1982, Congress enacted the Export Trading Company Act (ETCA)⁸ in order to clarify the extra-territorial application of United States antitrust law⁹ and to aid the export efforts of American business.¹⁰ Congress determined that if

1974), creates “any appreciable anticompetitive effects on United States commerce,” *National Bank of Canada v. Interbank Card Ass’n*, 1980-81 Trade Cas. (CCH) ¶ 63,836, at 78,472 (2d Cir. 1981), has an “impact upon United States commerce,” *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng’g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,784 (S.D.N.Y. 1977), or has an effect that “is not *de minimis*,” *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979). A recent formulation of the extraterritorial reach of United States antitrust law involves applying principles of international comity. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613, 615 (9th Cir. 1976). The court in *Timberlane* established a three-part “balancing test” for jurisdiction: the activity must have some actual or intended effect on United States foreign commerce, *id.* at 613, the effect must be sufficiently great to present a cognizable injury to the plaintiff, *id.*, and the interest of the United States must be “sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.” *Id.*

6. See *infra* notes 61-118 and accompanying text.

7. See *infra* notes 119-179 and accompanying text.

8. Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 15 U.S.C. §§ 6a, 4001-03, 4016-21 (1982)).

9. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 2-11 (1982) [hereinafter cited as House Report]; Guidelines for the Issuance of Export Trade Certificates of Review, 48 Fed. Reg. 15,937 (1983) [hereinafter cited as Certificate Guidelines]. Testimony before congressional committees emphasized that a primary concern of exporters was the possibility that their joint exporting ventures would constitute an antitrust violation under the Sherman Act. See *Foreign Trade Antitrust Improvements Act, Hearings on H.R. 2326 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 91 (1981) (statement of James R. Atwood, Esq.) (“The vitality and profitability of U.S. export trade can easily suffer from the dampening effects of the uncertainty of current law.”). For a detailed discussion of the legislative history of the ETCA, see Bruce & Peirce, *Understanding the Export Trading Company Act & Using (or Avoiding) its Antitrust Exemptions*, 38 Bus. Law. 975 (1983); Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition*, 58 Notre Dame L. Rev. 743 (1983); Reinsh, *The Export Trading Company Act of 1981*, 14 Law & Pol’y Int’l Bus. 47 (1982); Unkovic & La Mont, *The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion*, 87 Dick. L. Rev. 205 (1983); Zarin, *The Export Trading Company Act: Reducing the Uncertainty in Export Trade*, 17 Geo. Wash. J. Int’l L. & Econ. 297 (1983).

10. 15 U.S.C. § 4001(b) (1982). The primary objective of title III is to increase United States exports of products and services through the formation of export trade

American companies could join together and combine their resources without fear of violating antitrust laws, they would be able to export more effectively, thus helping the United States economy.¹¹ Title III¹² and title IV¹³ of the ETCA, therefore, attempt to clarify the jurisdictional scope of the antitrust laws in international transactions. These provisions, however, utilize different approaches to reach this goal. Title IV amends the Sherman Act¹⁴ and the Federal Trade Commission Act¹⁵ by providing that the antitrust laws apply to export conduct only if such conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic or import conduct or on the export conduct of a domestic competitor.¹⁶

By contrast, title III of the Act establishes a certification procedure administered by the Commerce Department¹⁷ in conjunction with the

associations and export trading companies that will be able to provide export trade services efficiently to United States producers and suppliers. *Id.*; see Conference Report, *supra* note 1, at 4; House Report, *supra* note 9, at 2; 127 Cong. Rec. S256 (daily ed. Jan. 19, 1981) (statement of Sen. Heinz).

11. See 15 U.S.C. § 4001(a)(5)-(6), (7) (1982). The Senate Committee on Banking, Housing, and Urban Affairs placed primary emphasis on aiding the development of trading companies. Senate Report, *supra* note 3, at 5. The Committee concluded that such companies, "by diversifying trade risk and developing economies of scale in marketing, financing, and other export trade service, can do the exporting for large numbers of U.S. producers." *Id.*; see H.R. Rep. No. 637, 97th Cong., 2d Sess. 11 (1982); 127 Cong. Rec. S256 (daily ed. Jan. 19, 1981) (statement of Sen. Heinz).

12. Pub. L. No. 97-290, tit. III, 96 Stat. 1233, 1240 (1982) (codified at 15 U.S.C. §§ 4011-4021 (1982)).

13. Pub. L. No. 97-290, tit. IV, 96 Stat. 1233, 1246 (1982) (codified at 15 U.S.C. § 6a (1982)).

14. 15 U.S.C. §§ 1-7 (1982).

15. *Id.* §§ 41-77 (1982).

16. *Id.* §§ 6a, 45(a)(3). Section 6a of the Sherman Act provides:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-

(1) such conduct has a direct, substantial, and reasonably foreseeable effect-

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations, or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of [this Act], other than this section.

Id. § 6a.

17. *Id.* § 4011. The fact that title III is administered by both the Commerce and Justice Departments represents a compromise. The House placed the certification procedure in the Justice Department. 128 Cong. Rec. H8463 (daily ed. Oct. 1, 1982) (statement of Rep. McClory). The compromise agreement, however, placed the procedure in the Department of Commerce and retained veto power in the Department of Justice. *Id.*

Justice Department, that immunizes specified export trade,¹⁸ export trade activities¹⁹ and methods of operation²⁰ from United States antitrust laws. The Commerce and Justice Departments pre-screen a proposed export arrangement for any antitrust violations.²¹ Certification of such conduct is permitted when the exporter establishes that the conduct will not restrain trade,²² unreasonably affect domestic prices,²³ constitute an unfair method of competition,²⁴ or result in the resale of the goods within the United States.²⁵ The standards of title III "encompass the full range of the antitrust laws."²⁶ Thus, only conduct that is lawful under current antitrust laws as amended by title IV will be certified. Certification, therefore, promotes export activity by assuring that business will not be subject to either government prosecutions or private actions.²⁷

Title III standards are designed to provide an objective method of determining whether export conduct is legal.²⁸ Nonetheless, the broad statutory language is capable of numerous interpretations.²⁹ While the

18. See 15 U.S.C. §§ 4013, 4016 (1982). Export trade is defined as "trade or commerce in goods, wares, merchandise, or services exported, or in the course of being exported from the United States or any territory thereof to any foreign nation." *Id.* § 4021(1).

19. See *id.* §§ 4013, 4016. Export trade activities are defined as "activities or agreements in the course of export trade." *Id.* § 4021(3).

20. *Id.* §§ 4013, 4016. Methods of operation are defined as "any method by which a person conducts or proposes to conduct export trade." *Id.* § 4021(4).

21. See *id.* § 4012(b)(2).

22. *Id.* § 4013(a)(1).

23. *Id.* § 4013(a)(2).

24. *Id.* § 4013(a)(3).

25. *Id.* § 4013(a)(4).

26. Conference Report, *supra* note 1, at 26. The Guidelines state that "[t]hese certification standards are intended to encompass the substantive law of antitrust as modified by the Webb-Pomerene Act." Certificate Guidelines, *supra* note 9, at 15,939 (footnote omitted).

27. 15 U.S.C. §§ 4016(a), (b)(1) (1982).

28. Title III deals directly with the problem of uncertainty by permitting antitrust immunity that is limited in scope to what is specified in the certificate, "thereby providing business with a greater degree of certainty." Senate Report, *supra* note 3, at 19.

29. The Commerce Department's interpretive Guidelines for the Issuance of Export Trade Certificates of Review were issued "[t]o promote greater certainty regarding the application of the antitrust laws to export trade." Certificate Guidelines, *supra* note 9, at 15,937 (quoting 15 U.S.C. § 4017(a) (1982)). The Certificate Guidelines discuss the requirements for eligibility, the standards for certification, and the analytical approach that the Commerce and Justice Departments will utilize in determining whether to issue a certificate. *Id.* at 15,937. When title III was first passed, various interpretations of the legislation were viable constructions of the statutory language. See, e.g., Bruce & Peirce, *supra* note 9, at 998-99; Zarin, *supra* note 9, at 349-50. Some of the debate has become moot since the Certificate Guidelines were issued. For example, the Guidelines reject the argument that the "unfair methods of competition" standard should be interpreted according to Federal Trade Commission Act precedents. Certificate Guidelines, *supra* note 9, at 15,939. See

title III Guidelines for the Issuance of Export Trade Certificates of Review (Guidelines) clarify the statutory language,³⁰ they raise other antitrust problems, such as spillover and foreclosure, without resolving them.³¹ Since the passage of title III, the Commerce Department has issued only fifteen certificates.³² Apparently, most exporters have chosen to rely on title IV's clarification of the jurisdictional scope of United States antitrust law rather than opt for the certainty of title III certification.³³ Because the export conduct certified under title III

infra note 136. For a more detailed analysis of the Guidelines, see Address of Eleanor Roberts Lewis, Ass't Gen. Counsel for the United States Dep't of Commerce, *World Trade Institute Seminar on the Export Trading Companies Act of 1982* 13-14 (available in files of *Fordham Law Review*) (May 1983) [hereinafter cited as Lewis].

30. See Certificate Guidelines, *supra* note 9, at 15,939.

31. See *id.*

32. Export Trade Certificate of Review for Farmers' Rice Coop., Applic. No. 84-00005 (Mar. 12, 1984); Export Trade Certificate of Review for VEXTRAC, Ltd., Applic. No. 83-00036 (Mar. 6, 1984); Export Trade Certificate of Review for United Export Trading Ass'n (UETA), Applic. No. 83-00023 (Feb. 21, 1984); Export Trade Certificate of Review for TWP Co., Inc., Applic. No. 83-00030 (Feb. 8, 1984); Export Trade Certificate of Review for U.S. Export & Trading Co. (USEX), Applic. No. 83-00024 (Dec. 23, 1983); Export Trade Certificate of Review for Barlar Int'l, Inc., Applic. No. 83-00020 (Dec. 9, 1983); Export Trade Certificate of Review for Texas First Intercontinental Trading Co., Applic. No. 83-00019 (Dec. 7, 1983); Export Trade Certificate of Review for Universal Trading Group Ltd. (UTG), Applic. No. 83-00005 (Nov. 28, 1983); Export Trade Certificate of Review for Trade Dev. Corp. of Chicago (TDCC), Applic. No. 83-0012 (Nov. 23, 1983); Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009 (Nov. 15, 1983); Export Trade Certificate of Review for DMT World Trade, Inc., Applic. No. 83-00016 (Nov. 4, 1983); Export Trade Certificate of Review for Int'l Dev. Inst. (IDI), Applic. No. 83-00001 (Nov. 4, 1983); Export Trade Certificate for Mktg. & Procurement Servs. Inc. (IMPS), Applic. No. 83-00002 (Oct. 25, 1983); Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), Applic. No. 83-00004 (Oct. 25, 1983); Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008 (Oct. 25, 1983). Statistics were compiled in March 1984.

33. There are several reasons why an exporter would choose not to apply for a certificate. For example, there is a built-in time lag in the certification process. The earliest that a certificate can be issued is thirty days from publication of the application in the Federal Register. 15 U.S.C. § 4013(c) (1982). The more typical time frame, however, is ninety days from the date that the application is deemed submitted, which is the statutory deadline. *Id.* § 4013(b). Furthermore, exporters will have the expense of legal costs incurred in the preparation of the application and drafting of the certificate. Address by Irving P. Margulies, Acting Gen. Counsel for the U.S. Dep't of Commerce, *World Trade Institute Seminar on Advanced International Antitrust*, at 7 (Dec., 5-6, 1983) (available in files of *Fordham Law Review*) [hereinafter cited as Margulies]. Moreover, the terms of the certificate may not be flexible enough for an exporter to deal with unforeseen market changes. See Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 *Fordham L. Rev.* 201, 218 (1982). Many potential certificate applicants have indicated an unwillingness to apply because of the concern that confidential business information will be disclosed, causing the exporter competitive harm. Lewis, *supra* note 29, at 17.

constitutes legal conduct under title IV,³⁴ a close examination of the certificates will enable exporters not certified under title III to better evaluate the legality of their export conduct.

This Note examines the certificates issued under title III and the manner in which the Justice Department and the Commerce Department have dealt with the problems of spillover and foreclosure. Part I gives a broad overview of title III and title IV and examines the manner in which a certificate is obtained under title III. Parts II and III examine the problems of spillover and foreclosure in domestic competition and analyze the ways in which the Justice Department and the Commerce Department have attempted to minimize such problems. The Note concludes that title III has caused a reexamination and reevaluation of spillover and foreclosure in the context of international trade and that the title III certificates may be a valuable tool in determining the antitrust concerns of the Justice Department. Non-certified exporters who are relying solely on the jurisdictional clarification of title IV should use the certificates as a guide in structuring their conduct.

I. TITLE III AND TITLE IV OF THE EXPORT TRADING COMPANY ACT

Title III of the ETCA establishes a legally binding preclearance certification procedure³⁵ under which both individuals³⁶ and businesses can obtain certificates that provide immunity from antitrust suits for specified export trade, export trade activities and methods of operation.³⁷ The primary objective of title III is "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers."³⁸

34. See Certificate Guidelines, *supra* note 9, at 15,939.

35. *Id.* at 15,937. The major benefit of obtaining title III certification is that a certificate delineates the limits of antitrust liability before an exporter begins to export. See *infra* notes 47-54 and accompanying text.

36. Title III allows any "person" who is engaged in export trade to apply for a certificate. See 15 U.S.C. § 4011 (1982). The term "person" is defined as follows: individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any State or of the United States; a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any State or of the United States; or any association or combination, by contract or other arrangement, between or among such persons.

Id. § 4021(5).

The Guidelines state that a certificate may be granted to an entity that conducts export trade as even a small part of its overall business. Certificate Guidelines, *supra* note 9, at 15,938. United States subsidiaries of foreign companies and foreign companies that are members of a United States trading entity are also eligible. *Id.*

37. 15 U.S.C. § 4013(a) (1982).

38. *Id.* § 4001(b).

The threshold issue in determining whether the Commerce Department will issue a title III certificate is whether the conduct proposed falls within the export conduct eligible for certification.³⁹ Definitions of what constitutes export trade, export trade activities, and methods of operation are provided in the statute.⁴⁰ The broad interpretive Guidelines for title III, however, establish that the types of export conduct eligible for certification encompass more than a reading of the statute would suggest.⁴¹ For example, while the statute appears to require that the goods to be exported must be produced in the United States,⁴² the Guidelines state that such goods may be produced elsewhere.⁴³ Furthermore, the statute requires that the goods must be "in the course of being exported,"⁴⁴ while the Guidelines state that the goods do not actually have to be exported to fall within the scope of the statute.⁴⁵

39. See Certificate Guidelines, *supra* note 9, at 15,938.

40. See *supra* notes 17-21 and accompanying text.

41. The Guidelines clarify much of the initial uncertainty about how broadly the term "export trade" may be construed. The Guidelines state that while the definition is similar to the definition in the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982); see Certificate Guidelines, *supra* note 9, at 15,938, export trade in title III also includes the export of services. *Id.* at 15,938; 15 U.S.C. § 4021 (1982). The term "service" is defined as "intangible economic output, including, but not limited to—(A) business, repair, and amusement services, (B) management, legal, engineering, architectural, and other professional services, and (C) financial, insurance, transportation, informational and any other data-based services, and communication services." *Id.* The Guidelines further define the parameters of services to include patent, trademark, know-how and technology licensing of persons located in other countries. Certificate Guidelines, *supra* note 9, at 15,938 n.9. The Guidelines indicate that proposed export conduct will be judged in a flexible manner. See *id.* at 15,938-39. For example, it is not important for eligibility purposes whether the proposed conduct is characterized as an export trade activity or a method of operation. *Id.* at 15,938. Examples of export trade activities include "the sale and shipment of goods or services abroad, advertising in the export market, international market research, product research and design, joint trade promotion, financing, communication and processing of foreign orders, and negotiating export contracts with foreign buyers." *Id.* Methods of operation listed include the use of exclusive foreign distributors, *id.*, the use of resale price maintenance for foreign sales, *id.* at 15,939, the disclosure or exchange of information between members and/or nonmembers, *id.*, the sale of goods or services on consignment, *id.* at 15,938, and the restriction of activities of members to export markets. *Id.* at 15,939.

42. See 15 U.S.C. § 4021(1) (1982).

43. Certificate Guidelines, *supra* note 9, at 15,938.

44. 15 U.S.C. § 4021(1) (1982).

45. Certificate Guidelines, *supra* note 9, at 15,938. Thus, the sale of a product within the United States that is ultimately destined for export may constitute "export trade." *Id.* The production of goods in the United States, however, will not ordinarily be considered "export trade" even if the goods are destined for export. *Id.*

One further clarification concerns overseas investment activity. Investments that are an integral part of the export of goods and service may be certifiable. *Id.* at 15,939. The Guidelines provide two examples of overseas investment that may be eligible for certification: investment in warehouse facilities overseas to store exported

Under the title III statutory standards, an exporter will be issued a certificate of review if it can establish that its activity will:

- (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
- (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
- (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
- (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.⁴⁶

The title III certification procedure attempts to strike a balance between a desire to protect the domestic market and domestic competitors from anticompetitive conduct and a desire to increase exports.⁴⁷

products until such products are transferred to a foreign purchaser, and minor product or packaging modification activities necessary to comply with foreign market requirements. *Id.*

The Guidelines are clearly an attempt by both the Commerce and Justice Departments to encourage trade by maximizing the scope of the exemption within the limits of the antitrust laws. The Assistant General Counsel for Export Trading Companies has suggested that exporters "be creative in construing 'export conduct.'" Lewis, *supra* note 29, at 9. For example, a literal interpretation of the fourth standard of title III, 15 U.S.C. § 4013(a)(4) (1982), precludes importing any of the goods or services exported under the certificate. *Id.* Such an interpretation may result in substantial difficulties because it precludes importing into the United States products made from component parts that had originally been exported from the United States and assembled overseas. Lewis, *supra* note 29, at 15-16. Goods manufactured under licensing agreements may also be precluded from reentry. *Id.* Thus, antitrust problems may arise because more competitive products would be prevented from entering the United States, resulting in an anticompetitive effect on American markets. *Id.*

These potential problems, however, are eliminated by the rejection of a literal approach in the Guidelines and by the adoption of a statutory construction that focuses on the purpose of the standard, which is to "ensure that the anticompetitive effects, if any, of proposed export conduct [do] not have a domestic impact through the export and subsequent re-import of the goods or services back into the United States." Certificate Guidelines, *supra* note 9, at 15,940. The Guidelines establish two requirements: (1) did the exporter reasonably expect that the exported goods or services would reenter the United States for sale or consumption, and (2) would the sale have a significant domestic impact. *Id.* at 15,940.

46. 15 U.S.C. § 4013(a)(1)-(4) (1982).

47. 128 Cong. Rec. H8459 (daily ed. Oct. 1, 1982) (statement of Rep. Brooks) ("[T]he certification procedure . . . is a balanced one. It includes protection for the certified exporter . . . but it also protects competitors and consumers from injury caused by anticompetitive conduct.")

Title III encourages cooperation between potential and actual competitors⁴⁸ and provides a mechanism by which small and medium-sized American businesses can decrease the costs of exporting and compete with foreign competitors.⁴⁹ At the same time, the standards limit cooperative activities to the export market in order to avoid conduct adversely affecting American competitors.⁵⁰

Title III encourages exporters to disclose their activities by protecting the certificate holder and any members identified in the certificate from private treble damage actions⁵¹ and from government criminal and civil suits under state and federal antitrust laws.⁵² A private cause of action can be prosecuted successfully only if the Commerce and Justice Departments have incorrectly issued the certificate.⁵³ Immunity from government prosecution extends to export conduct that is specified in the certificates and that is carried out during the effective period of the certificate.⁵⁴

By contrast, title IV is an amendment to the Sherman Act and the Federal Trade Commission Act providing that unless conduct involving trade or commerce, other than import trade or import commerce, has a "direct, substantial, and reasonably foreseeable effect" on domestic competition or domestic competitors, United States antitrust laws do not apply.⁵⁵ The threshold requirement of title IV does not take into consideration nationality or territoriality principles.⁵⁶ By

48. Senate Report, *supra* note 3, at 4.

49. See 15 U.S.C. § 4001(a)(7) (1982).

50. Conference Report, *supra* note 1, at 1; see Certificate Guidelines, *supra* note 9, at 15,939.

51. 15 U.S.C. § 4016(a) (1982).

52. *Id.* § 4016(b)(1).

53. See *id.* § 4016(a). The Commerce and Justice Departments may incorrectly issue a certificate by improperly applying the four statutory eligibility standards. *Id.* § 4014(b)(1). In addition, after the issuance of a certificate, the certified conduct may no longer meet the eligibility standards because of changed circumstances. *Id.* §§ 4014(b)(2), 4016(a) (conduct must meet eligibility standards to maintain immunity). Only one certificate issued thus far requires the filing of an annual report. See Export Trade Certificate of Review for United Export Trading Ass'n (UETA), Applic. No. 83-00023, at 6-7 (Feb. 21, 1984). This report must contain the company's total annual domestic and export sales information. *Id.* The report may be used to verify that the circumstances under which the certificate was issued have not substantially changed. See Address by C.W. Conrath, Ass't Chief, Foreign Commerce Section, Antitrust Division, U.S. Dep't of Justice, *Early Experience Under the Export Trading Company Act of 1982* before the Pa. Bar Institute (Nov. 2, 1983), at 12 (available in files of *Fordham Law Review*) [hereinafter cited as Conrath].

54. There is no statutory time limit on the effectiveness of a certificate. Lewis, *supra* note 29, at 6. Certificates remain effective until they are revoked or modified in accordance with title III. See 15 U.S.C. §§ 4014, 4016 (1982).

55. 15 U.S.C. § 6a(1) (1982).

56. House Report, *supra* note 9, at 9-10.

eliminating some of the confusion and uncertainty arising from recent case law, the goal of title IV is to create a uniform standard applicable to export transactions that will provide more concrete guidance to counsel and clients.⁵⁷

Under title IV of the ETCA, United States exporters may now engage in restrictive export business practices that were previously prohibited, as long as the effects of these practices are limited to foreign markets.⁵⁸ The jurisdictional threshold of title IV is met, however, if the effects of export conduct are not so limited.⁵⁹ For example, if in the process of implementing export sales, domestic competitors share cost or price information relating to their United States sales, the potential spillover effect in the domestic market may result in antitrust liability under the Sherman Act.⁶⁰ The Commerce and Justice Departments, interpreting current antitrust law, have recognized the dangers of spillover and foreclosure and have structured the title III certificates to limit the conduct of exporters, thus avoiding the risk of anticompetitive behavior.⁶¹ Accordingly, an examination of the certificates should assist the uncertified exporter in determining what conduct will meet the jurisdictional requirements of title IV.

II. THE SPILLOVER EFFECT: COLLUSION AMONG EXPORTERS

Joint activity in an export market may diminish or eliminate competition in a domestic market. This may occur either directly, by using exchanges of business information as a forum for discussion and agreement on output or sales policies,⁶² or indirectly, by regulating export

57. *Id.* at 2; Golden & Kolb, *supra* note 9, at 783.

58. Bruce & Peirce, *supra* note 9, at 983-84. Title IV may allow firms to engage in conduct in export markets that if engaged in domestically would constitute an antitrust violation. *Id.* For example, United States exporters will have more freedom to form cartels, as long as there is no effect on domestic commerce. *Id.* "[A] price-fixing conspiracy, directed solely to exported products or services, absent a spillover effect on the domestic marketplace . . . would normally not have the requisite effects on domestic or import commerce." House Report, *supra* note 9, at 10.

59. See 15 U.S.C. § 6a(1)(B) (1982).

60. A restraint that adversely affects domestic competitors by foreclosing their export opportunities is a sufficient predicate for title IV jurisdiction. B. Hawk, United States, Common Market & International Antitrust: A Comparative Guide 45 (1979). For example, "an agreement among United States manufacturers to pool foreign patents [would] prevent United States manufacturers from exporting to those countries covered by the patents." *Id.*

61. See *infra* notes 92-118, 154-79 and accompanying text.

62. 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad § 9.08, at 287-88 (2d ed. 1981); see *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978); *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567 (1925); American

sales that can lessen domestic competition and artificially maintain domestic prices.⁶³ Any drastic change in the volume of United States exports, therefore, may spill over into the domestic market by creating a surplus, shortage or price disruption.⁶⁴ Such effects are termed "spillover" because conduct in one market "spills over" into a second market.⁶⁵

Congress first immunized certain types of export conduct from antitrust laws under the Webb-Pomerene Export Trade Act.⁶⁶ In *United States v. Minnesota Mining & Manufacturing Co.*,⁶⁷ the court balanced the dangers of spillover against the intended benefits of a Webb-Pomerene export exemption:

Now it may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members' competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The [Act] is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the [Act] as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function.⁶⁸

Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 963 (D. Mass. 1950); Ryan, *The Export Trading Company Act of 1982: Antitrust Panacea, Placebo, or Pitfall?*, 28 Antitrust Bull. 501, 508 (1983).

63. 1 J. Atwood & K. Brewster, *supra* note 62, at 288; see *United States v. Anthracite Export Ass'n*, 1970 Trade Cas. (CCH) ¶ 73,348 (M.D. Pa. 1970); *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 68, 77-80 (S.D.N.Y. 1949); Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1555 (1982); Fox, *Antitrust and Export Trade* in Practising Law Inst., *The Export Trading Company Act*, 57, 73 (1983) (Course Handbook No. 405) [hereinafter cited as Fox I]; Fox, *Updating the Antitrust Guide for International Operations—A Greener Light for Export and Investment Abroad*, 15 Vand. J. Transnat'l L. 709, 727 (1982) [hereinafter cited as Fox II]. For example, conduct would fall within the reach of United States antitrust law "if a domestic export cartel were so strong as to have a spillover effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices." House Report, *supra* note 9, at 13.

64. Bruce & Peirce, *supra* note 9, at 991-92. Major fluctuations in world market conditions may also have an effect on United States markets. *Id.* at 992.

65. See Antitrust Division, U.S. Dep't of Justice, *Antitrust Guide for International Operations* 20 (1977) [hereinafter cited as *Antitrust Guide*]; Zarin, *supra* note 9, at 322-23.

66. See Webb-Pomerene Act, ch. 50, § 5, 40 Stat. 517 (1918) (codified as amended at 15 U.S.C. §§ 61-66 (1982)).

67. 92 F. Supp. 947 (D. Mass. 1950).

68. *Id.* at 965. The legislative history indicates that Congress recognized that the activities of Webb associations might spill over into the domestic market. See H. R.

In accord with the court's analysis, the Justice Department has recognized that a joint venture produces potential benefits of significant economies of scale in foreign markets that may outweigh a possible collusive spillover effect in the domestic market.⁶⁹

Rep. No. 50, 65th Cong., 1st Sess. 1-3 (1917). By enacting the Webb-Pomerene Act, however, Congress intended to effectuate a policy that was in the national interest and to stimulate exports even though some danger to domestic competition might exist. 55 Cong. Rec. 2,786 (1917). The Webb-Pomerene Act permits United States exporters to join together to engage in export trade activity that is exempt from the Sherman Act if the exporters comply with its provisions. 15 U.S.C. §§ 61-66 (1982). Section 2 of the Webb-Pomerene Act, *id.* § 62, provides that nothing in the Sherman Act shall be construed as declaring illegal an association entered into "for the sole purpose of engaging in export trade and actually engaged solely in such export trade," or acts done or agreements made in the course of such export trade. *Id.*

There are two provisions in the Webb-Pomerene Act that limit the export exemption. First, the Webb-Pomerene association's activities may not be in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of the association. *Id.* Second, the association may not enter into any agreement that "artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." *Id.* The National Commission for the Review of Antitrust Laws and Procedures concluded that the Webb-Pomerene Act "creates opportunities for significant anticompetitive spillover effects in domestic commerce." National Commission for the Review of Antitrust Laws and Procedure, Report to the President and the Attorney General 302 (1979). Case law on Webb-Pomerene associations indicates that the risk of a domestic spillover effect is real. In fact, the activities of Webb-Pomerene association members are considered violations of the Sherman Act, unprotected by the Act's immunity provisions, when the courts discover such a spillover effect. See, e.g., *United States v. Anthracite Export Ass'n*, 1970 Trade Cas. (CCH) ¶ 73,348, at 89,402 (M.D. Pa. 1970) (Webb-Pomerene association enjoined from jointly controlling the prices or allocating the amounts of anthracite coal to be supplied to the army); *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 70-71, 79-80 (S.D.N.Y. 1949) (using an export association to stabilize domestic prices by systematically exporting surplus domestic production violated § 2 of the Sherman Act).

For a general discussion of the Webb-Pomerene Act, see W. Fugate, *Foreign Commerce and the Antitrust Laws* § 7 (3d ed. 1982); Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 Hous. L. Rev. 24 (1974); Chapman, *Exports & Antitrust: Must Competition Stop at the Water's Edge?*, 6 Vand. J. Transnat'l L. 399 (1973); McDermid, *The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*, 37 Wash. & Lee L. Rev. 105 (1980); Note, *The Webb-Pomerene Act: A Reexamination of Export Cartels in World Trade*, 19 Va. J. Int'l L. 151 (1978).

69. See Antitrust Guide, *supra* note 65, at 19-20. In dictum, Judge Wyzanski in *Minnesota Mining*, posited that "[t]he intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter sese* in the American market." 92 F. Supp. at 963. While the Antitrust Guide states that participants in a joint venture involving actual or potential competitors should use special care "to

Although the *Minnesota Mining* standard is reflected in the title III Guidelines,⁷⁰ the Commerce and Justice Departments remain concerned about cooperation among parties that directly restrains domestic competition.⁷¹ The Guidelines evidence this concern by focusing specifically on one type of collusive behavior: the exchange of important domestic business information among domestic competitors.⁷² An export company is often in a position to be a conduit for the exchange of business information among competing firms.⁷³ For example, in order to set prices on goods for export, one company must collect relevant cost information, output potential and market demand from

insure that the parties stick strictly to the joint venture's legitimate business," Antitrust Guide, *supra* note 65, at 20, the Justice Department seems not to have accepted Judge Wyzanski's dictum. Instead, it recognizes that while "[a]ny joint venture among competitors involves some antitrust risk," *id.*, this risk may be limited by using "special care in policing [its] operations." *Id.*

70. Certificate Guidelines, *supra* note 9, at 15,939.

71. See Certificate Guidelines, *supra* note 9, at 15,939 ("The agencies will carefully evaluate the likelihood that proposed export conduct will facilitate collusion in the domestic market, or otherwise have a substantial anticompetitive impact, before a certificate is issued."). Commentators have described the concern that a joint venture provides a forum that can be misused to develop agreements that restrain domestic trade as "the potential forum argument." 2 J. Atwood & K. Brewster, *supra* note 62, § 12.36, at 110.

72. See Certificate Guidelines, *supra* note 9, at 15,939. "[I]f the exchange of price, output, or other sensitive information in the course of export trade will result in a substantial lessening of competition in the domestic market, that method of operation will not be certified.").

73. See Conrath, *supra* note 53, at 8-9. Many business firms that have applied for title III certificates plan to engage in export facilitation. See, e.g., Export Trade Certificate of Review for VEXTRAC, Ltd., Applic. No. 83-00036, at 2 (Mar. 6, 1984); Export Trade Certificate of Review for United Export Trading Ass'n (UETA), Applic. No. 83-00023, at 2-3 (Feb. 21, 1984); Export Trade Certificate of Review for Texas First Intercontinental Trading Co., Applic. No. 83-00019, at 4 (Dec. 7, 1983); Export Trade Certificate of Review for Universal Trading Group Ltd. (UTC), Applic. No. 83-00005, at 2-3 (Nov. 28, 1983). Rather than manufacture their own products and export them, these firms will aid other firms to export products either by acting as sales representatives in an export market or by buying the product themselves and selling it in the export market. See, e.g., Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009, at 2 (Nov. 15, 1983); Export Trade Certificate of Review for DMT World Trade, Inc., Applic. No. 83-00016, at 2 (Nov. 4, 1983); Export Trade Certificate of Review for Int'l Dev. Inst. (IDI), Applic. No. 83-00001, at 2-3 (Nov. 4, 1983); Export Trade Certificate of Review for Int'l Mktg. & Procurement Servs., Inc. (IMPS), Applic. No. 83-00002, at 2-3 (Oct. 25, 1983). If a company acts as the export sales representative for all firms in a highly concentrated industry, it could "become a conduit for domestic price, capacity, or output information among all the competing firms it represents." R. Posner, *Antitrust Law: An Economic Perspective* 145 (1976); see Conrath, *supra* note 53, at 9.

participating exporters.⁷⁴ The Guidelines provide that if the exchange of price, output or other sensitive information will result in a substantial lessening of competition in the domestic market, the conduct will not be certified.⁷⁵

Similarly, non-certified exporters must be concerned with the spillover problem when sensitive domestic information is exchanged.⁷⁶ The Justice Department will evaluate the nature of the arrangement, the participants in the arrangement and the similarities of pricing structure in the domestic and foreign markets to ascertain whether substantial danger of an improper exchange of domestic information exists.⁷⁷ This concern is evidenced by the great emphasis that has been placed on the spillover problem in title III certificates.⁷⁸

From an economic standpoint, information exchanges should not be prohibited categorically because such exchanges may provide significant benefits.⁷⁹ Generally, if sellers possess substantial information

74. See Export Trade Certificate of Review for VEXTRAC, Ltd., Applic. No. 83-00036, at 2 (Mar. 6, 1984); Export Trade Certificate of Review for United Export Trading Ass'n (UETA), Applic. No. 83-00023, at 3-4 (Feb. 21, 1984); Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), Applic. No. 83-00004, at 1-2 (Oct. 25, 1983).

75. Certificate Guidelines, *supra* note 9, at 15,939.

76. See *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567, 584-86 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 387-90, 400 (1921). For a discussion of the trade association cases see Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Associations Activities*, 21 U. Chi. L. Rev. 527 (1954); Note, *Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?*, 63 Va. L. Rev. 639 (1977).

77. See Conrath, *supra* note 53, at 8. The most serious anticompetitive risk that a joint venture poses is collusion because a joint venture can provide "a singularly effective vehicle for cartelization." Brodley, *supra* note 63, at 1530. Joint ventures may promote collusion by enabling each participant to monitor the other's behavior. *Id.* at 1531. Additionally, joint ventures may "facilitate collusion by giving participating firms symmetrical goals and strategies." *Id.*

78. Conrath, *supra* note 53, at 7-8 ("[T]he possibility of exchange of price or related information among domestic competitors . . . has been one of the most important antitrust issues—if not the most important antitrust issue—presented in the early [certificate] applications.").

79. R. Posner, *supra* note 73, at 136; see *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925) ("members of trade associations [do not] become . . . conspirators merely because they gather and disseminate information . . . bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses."); Fox I, *supra* note 63, at 74 ("If . . . collaboration . . . is intended to gain marketing efficiencies abroad that the firms cannot otherwise achieve . . . [it] might be acceptable under the U.S. antitrust law."). But see *United States v. Container Corp. of Am.*, 393 U.S. 333, 335, 338 (1969) (exchange of business information unlawful if it has anticompetitive effect even if purpose of exchange is to protect legal rights from fraud).

about their competitors' output and prices, they may be better able to gauge market demand and allocate resources, thereby enabling them to operate more efficiently.⁸⁰ This information, however, also may be used in an anti-competitive manner to fix prices.⁸¹

An inquiry into information exchanges, therefore, should focus on whether the market in which such an information exchange occurs has certain characteristics that foster collusion. For example, as the market becomes more concentrated the likelihood that an exchange of information will foster collusion, rather than assist in equalizing sup-

80. R. Posner, *supra* note 73, at 136; see *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."); Margulies, *supra* note 33, at 23 ("Certification may be appropriate where such exchange of information are necessary to conduct the joint export activity effectively.").

81. See R. Posner, *supra* note 73, at 136 ("Information is thus a two-edged sword: it is necessary if the competitive process is to work properly, but it can also facilitate collusion."); Brodley, *supra* note 63, at 1523 ("A single economic arrangement or transaction may either cripple competition or vitally promote economic efficiency and innovation."). Two early domestic trade association cases differentiate legal exchanges of information among competitors from illegal collusive agreements. See *Maple Flooring Mfrs. Ass'n. v. United States*, 268 U.S. 563, 567 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 400, 410-11 (1921).

In *American Column*, a trade association composed of 365 hardwood manufacturers, accounting for one-third of the total hardwood production in the United States, had an open-competition plan that provided a central clearing-house for information on prices, trade statistics, and practices. 257 U.S. at 391, 393, 398-99. Each member submitted a great deal of very detailed information which was then distributed in detailed reports to association members. *Id.* at 394-95. The members also met to discuss competitive problems in the industry. *Id.* at 396-97. Because the purpose and effect of such conduct was to restrain competition, the Court found a violation of § 1 of the Sherman Act. *Id.* at 412.

In *Maple Flooring*, the 22 member trade association possessed an aggregate market share of 70%. 268 U.S. at 565-66. The association collected and distributed information similar to that in *American Column*. See *id.* at 566-67. The Court held that the fact that an association provided a potential forum for an illegal restraint of competition was not sufficient to establish a violation of § 1 of the Sherman Act absent proof of an agreement or action to restrain trade. *Id.* at 585-86.

Posner provides an insightful critique of the Supreme Court's reasoning in these early trade association cases. See R. Posner, *supra* note 73, at 141. He agrees with Justice Brandeis' dissent in *American Column*, 257 U.S. at 413, that "the low level of concentration in the industry" and the fact that the mills were widely scattered made "the inference of collusion implausible" and the establishment of "some system of centralized information" exchange necessary. R. Posner, *supra* note 73, at 141. By contrast, Posner states that "[A]n inference of collusion fairly leaps out of the facts" of *Maple Flooring* in part because the compilation of average cost is a useless statistic except for establishing a basis for a collusive price. *Id.* at 142-43.

ply and demand, increases.⁸² In addition, if an inelastic demand exists at the competitive price, price collusion is more profitable.⁸³ Moreover, if the product is fungible, the cost of collusion is lowered.⁸⁴ When competitors share information that will facilitate collusion rather than improve competition, the information exchange should be illegal.⁸⁵ Exporters operating without a title III certificate should limit the flow of information when market conditions exist that indicate a serious threat of collusion because such collusion meets the jurisdictional threshold of title IV and, if proven, is a violation of the Sherman Act.⁸⁶

The efforts of the Commerce and Justice Departments to ensure that the threat of spillover is limited are evident in a standard provision of the certificates issued. This provision prohibits any direct or indirect disclosure of business information to a competitive firm.⁸⁷

82. *Id.* at 145. A threat of output restriction exists when a joint venture encompasses so many firms in a concentrated market that "the opportunity to get together and discuss the joint venture role is likely to facilitate collusion in the markets from which they came." Applebaum, Barnett, Holmes & Pollock, Panel Discussion, Interview with William F. Baxter, Ass't Att'y Gen., Antitrust Div., 50 Antitrust L. J. 151, 161 (1981) (statement of William F. Baxter) [hereinafter cited as Panel Discussion].

83. Demand is inelastic when no adequate substitutes exist and demand is not significantly affected by a "not insignificant" rise in price. Fox II, *supra* note 63, at 715 n.20. Elastic demand indicates that buyers will shift their demand for goods even with a small rise in price. *Id.* at 716. If demand is elastic, therefore, profitable price collusion cannot be maintained. *Id.*

84. R. Posner, *supra* note 73, at 145. A symptom of collusive pricing is "a combination of excess capacity with frequent new entry" into the market. *Id.*; see U.S. Dep't of Justice, Merger Guidelines 29 (1982) (specifying market conditions that make collusion feasible and profitable).

85. See *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969).

86. The specific types of limitations on information exchanges that exporters should include in their contractual agreements with their export competitors and that may prevent antitrust violations are delineated in the certificates issued under title III. See, e.g., Export Trade Certificate of Review for United Export Trading Ass'n (UETA), Applic. No. 83-00023, at 3-4 (Feb. 21, 1984) (information restricted to competitive conditions and other facts pertaining to export market only); Export Trade Certificate of Review for Trade Dev. Corp. of Chicago (TDCC), Applic. No. 83-00012, at 3 (Nov. 23, 1983) (information restricted to export market); Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2 (Oct. 25, 1983) (information exchanged in form of draft or completed proposal); Export Trade Certificate of Review for VEXTRAC, Ltd., Applic. No. 83-00036, at 2-3 (Mar. 6, 1983) (distribution of information separately to prospective participants).

87. The standard language in the provisions generally specifies that business information means costs, including costs of goods sold, general sales, and administrative expenses, production, capacity, inventories, domestic prices, domestic sales, domestic orders, terms of domestic marketing or sale, United States business plans, strategies, or methods, or any other business information that is not materially

The contractual agreements between competitors, however, do not have to be this restrictive. One possible reason for this broad prohibition in some certificates is that the proposed conduct in those certificates is described in very general terms.⁸⁸ In addition, many of the certificate holders are export facilitation firms that have applied to represent "virtually any firm."⁸⁹ This open-ended conduct with its resulting indefiniteness not only presents a substantial spillover threat, but also makes it more difficult to gauge the extent of that threat in a particular case. Because an exchange of information may promote, rather than inhibit competition, a flat prohibition against any exchange of information is not always the preferred method for dealing with the spillover problem.⁹⁰ If the export conduct is described adequately and other factors exist that minimize the threat of collusion, a more individualized approach can be taken.⁹¹

related to the certified conduct, unless such information has already been made generally available to the trade or public. *See* Export Trade Certificate of Review for Int'l Mktg. & Procurement Servs., Inc., (IMPS), Applic. No. 83-00002, at 4 (Oct. 25, 1983), which was the first certificate to include the standard provision information.

88. Conrath, *supra* note 53, at 8.

89. *Id.*; *see, e.g.*, Export Trade Certificate of Review for Trade Dev. Corp. of Chicago (TDCC), Applic. No. 83-00012, at 1 (Nov. 23, 1983) (TDCC will supply consulting services to facilitate the export of products for suppliers entering or operating in the export markets.); Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009, at 1 (Nov. 15, 1983) (ITS will provide such export trade services as consulting and market and product research and design in all parts of the world.); Export Trade Certificate of Review for Int'l Mktg. & Procurement Servs., Inc. (IMPS), Applic. No. 83-00002, at 1 (Oct. 25, 1983) (IMPS will provide such export trade services as consulting, international market research, product research and design in the Middle East, Europe, the Far East, and Australia.).

90. Margulies, *supra* note 33, at 22-23; *see* United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978). Because of the standard prohibition, however, an information exchange often would be outside the scope of protected conduct. Margulies, *supra* note 33, at 23.

91. Margulies, *supra* note 33, at 23. An exchange of inventory and other information necessary to conduct joint export activity effectively should be certifiable, as long as the exporter identifies the specific products and domestic competitors involved, thus enabling the Commerce and Justice Departments to determine market concentration, market entry conditions, and short-run supply and demand substitutability. *Id.* at 23.

The government's analysis of the spillover threat should be a two-step process: (1) whether the proposed conduct has a domestic spillover effect that violates the ETCA standards, and (2) if so, what are the terms and conditions that can be imposed upon the operations of the trading entity that will minimize or eliminate the spillover effect. Zarin, *supra* note 9, at 323. When the exchange of information can be described with enough specificity that the Commerce and Justice Departments can determine that it is not anticompetitive in domestic markets, it can be certified. Conrath, *supra* note 53, at 10.

The certificate issued to Intex International Trading Company, Inc. (Intex),⁹² presents one example in which the nature and context of the information exchange was defined with sufficient specificity to justify such an exchange. Intex will provide consulting engineering services in all parts of the world except the United States.⁹³ One service Intex will perform is to solicit and identify overseas projects in which some or all of its clients will join together in preparing a bid or offering their services for the project.⁹⁴ In order to accomplish its export conduct, Intex must have access to certain information from the various engineering firms. As a result, Intex applied for, and was granted, a certificate to immunize this exchange of information from antitrust liability.

The certificate describes in very specific terms how the information exchange may work. It states:

Intex may receive from each client interested in participating in a project all information relevant to the preparation of a bid or other offer of the client's services. . . . For any specific project, Intex may circulate the data supplied by each client for that project to all the participating clients in the form of a draft and/or completed proposal.⁹⁵

Three factors are significant in this information exchange. First, the exchange of information is for only one project. Spillover problems "are less likely in a one-shot joint venture than in an ongoing arrangement."⁹⁶ Second, the data circulated to the clients are summarized. If information is in a less detailed form, it may be more difficult to use in a collusive manner.⁹⁷ Finally, Intex structured this venture to provide

92. Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008 (Oct. 25, 1983).

93. *Id.* at 2. Almost all of the certificates specify a worldwide export market (excluding only the United States and the United States territories). *See, e.g.*, Export Trade Certificate of Review for Texas First Intercontinental Trading Co., Applic. No. 83-00019, at 3 (Dec. 7, 1983); Export Trade Certificate of Review for DMT World Trade, Inc., Applic. No. 83-00016, at 1 (Nov. 4, 1983).

94. *See* Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2 (Oct. 25, 1983). The Intex arrangement is analogous to that of a general contractor organizing subcontractors for bidding purposes. The Antitrust Guide suggests that such an arrangement should not violate the antitrust laws. *See* Antitrust Guide, *supra* note 65, at 19-21.

95. Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2 (Oct. 25, 1983).

96. Antitrust Guide, *supra* note 65, at 20 n.36.

97. *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 584-86 (1925). The Court in *Maple Flooring* held that the Maple Flooring Manufacturers Association, "which openly and fairly gather[ed] and disseminate[d] information as to the

that only noncompetitive firms would be involved in any one project.⁹⁸ The potential for collusion, therefore, is minimized substantially because the information exchange is not between actual competitors.⁹⁹

Despite the existence of these safeguards in the certificate, the Commerce Department further ensured against spillover by specifically limiting, on the basis of market share, the firms that could take part in this venture. Because the threat of collusion increases as the market becomes more concentrated, the Intex certificate sets limits on market share and market strength.¹⁰⁰ Specific conditions also have been included to minimize any increase of market domination. The certificate provides that Intex may enter into relationships with up to fifteen United States consulting engineering firms (the clients) and that these firms will be substantially *not* in competition with each other.¹⁰¹ No engineering firm may have gross billings exceeding \$100 million.¹⁰² When non-client consulting engineering firms are included for a specific bid proposal, the same stipulations provide that total annual billings must not exceed \$100 million and that the firms participating in that project must be substantially not in competition.¹⁰³ Furthermore, in addition to the very limited information exchanges

cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption . . . [did] not thereby engage in unlawful restraint of commerce." 268 U.S. at 586. In *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), the Court had held that a plan by hardwood companies to exchange detailed information through the American Hardwood Manufacturers Association violated § 1 of the Sherman Act. *Id.* at 412. The *Maple Flooring* Court distinguished *American Column* by stating that "the character of the information which had been gathered [in *American Column*] and the use which was made of it led irresistibly to the conclusion that [it] had resulted, or would necessarily result, in a concerted effort of the defendants to curtail production or raise prices of commodities shipped in interstate commerce." 268 U.S. at 584-85.

98. See Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2 (Oct. 25, 1983). This condition was suggested by Intex, not by the Commerce Department. See Scouton, *Six Firms Certified Under the Export Trading Company Act*, Bus. Am., Nov. 28, 1983, at 24.

99. The courts and the Justice Department have been concerned with information exchanges between actual competitors. See, e.g., *United States v. Container Corp. of Am.*, 393 U.S. 333, 336 (1969); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 387 (1921).

100. See Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2 (Oct. 25, 1983).

101. *Id.*

102. *Id.*

103. See *id.* at 3.

described above, Intex is subject to the standard prohibition against disclosure of information.¹⁰⁴

Using the Intex certificate as a guide, companies engaging in similar, but uncertified, conduct must be concerned whether they are dealing with actual or potential competitors, the market share of each of the firms involved and whether the export activity is ongoing in nature or is limited to discrete projects. The spillover problem varies greatly depending on the export arrangement, the export conduct and the objectives of the export venture. Because the spillover threat is fact-specific,¹⁰⁵ if an exporter operating without a title III certificate is involved in export conduct that is identical or nearly identical to the certified conduct, following the specific provisions in the certificate should enable the exporter to avoid spillover problems. Any exchange of information that is prohibited in a certificate would violate the antitrust laws and would be prohibited under title IV, thereby bringing the exporter within the jurisdictional scope of the Sherman Act. The Justice Department, however, may tolerate more spillover in the activities under title III because those activities are monitored closely under the certification procedure.¹⁰⁶

The certificate application of VEXTRAC, Ltd.¹⁰⁷ presents another problem. VEXTRAC is a not-for-profit corporation controlled by the Virginia Port Authority.¹⁰⁸ To encourage the use of Virginia ports, VEXTRAC arranged an export joint venture that requires exporters to use Virginia ports. In exchange, VEXTRAC will provide export-facilitation services including financing activities, legal assistance and market analysis.¹⁰⁹ VEXTRAC applied for a certificate that would permit the collection of information necessary to study the feasibility of export joint ventures. The certificate that was issued allows VEXTRAC to collect from prospective participants commercial, financial and

104. *Id.* ("Intex will not intentionally disclose, directly or indirectly, to a client or to a non-client firm . . . any business information obtained from a client or from a non-client firm.").

105. *E.g.*, Export Trade Certificate of Review for VEXTRAC, Ltd., Applic. No. 83-00036 (Mar. 6, 1984) (certificate structured to deal with fact-specific spillover problem); Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008 (Oct. 25, 1983) (same).

106. An additional safeguard against spillover is that certificate holders must submit annual reports to the Commerce Department. *See* 15 U.S.C. § 4018 (1982). The certificate issued to Intex exemplifies the goals of the certification process in that it allows for small engineering firms to join together to bid on large overseas projects through facilitating mechanisms provided by the Intex corporation. *See* Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2-3 (Oct. 25, 1983). These firms probably would otherwise be unable to join together, especially in terms of information sharing.

107. Export Trade Certificate of Review for VEXTRAC, Ltd., Applic. No. 83-00036 (Mar. 6, 1984).

108. *Id.* at 2.

109. *Id.*

industrial information on the condition that VEXTRAC limit access to this information and provide only average figures from the information it receives.¹¹⁰

The conditions under which VEXTRAC may disseminate information provide several safeguards against spillover. VEXTRAC cannot disclose the number or identities of companies solicited and must distribute separately to each prospective participant the results of its feasibility study.¹¹¹ The study must contain information limited solely to the export markets.¹¹² VEXTRAC may not separately distribute specific information concerning domestic prices, costs of production, production capacity, production volume, domestic sales volume or inventories.¹¹³ All such information must be conveyed solely as averages.¹¹⁴

The safeguards against spillover found in the VEXTRAC certificate demonstrate a concern for the exchange of information that is parallel to that of the dissemination of information cases in the domestic context in which the standards are very stringent.¹¹⁵ Because many export arrangements involve an intermediary such as VEXTRAC, the limitations outlined in the certificate should be followed closely to avoid possible antitrust liability created by an anti-competitive effect on domestic prices.¹¹⁶

110. *Id.* at 3.

111. *Id.* at 2-3.

112. *Id.* Such information includes selling strategies, prices in the foreign market, projected demand, customary terms of sale and information on expenses specific to the actual exporting to the markets. *Id.*

113. *Id.* at 3.

114. *Id.*

115. *See, e.g.,* United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579-84 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921).

116. Another certificate that authorizes a limited amount of information exchange was issued to Barlar International, Inc., which deals mainly in military products and related services. *See* Export Trade Certificate of Review for Barlar Int'l, Inc., Applic. No. 83-00020, at 1-2 (Dec. 9, 1983). Barlar functions as an export services intermediary between buyers and sellers. *See id.* at 2. Barlar may obtain lists of potential buyers and furnish its products list to such buyers. *Id.* When a buyer requests the price of a particular product, Barlar may ask one or more United States suppliers individually to supply a price quotation for that product. *Id.* Barlar may transmit the price quotation to the buyer after adding its mark-up to the United States supplier's price. *Id.* Because there is no way that Barlar can act as a facilitating conduit for information exchanges among competitors, no condition prohibiting exchanges of information was necessary in this certificate. Similarly, if only two companies are involved in an enterprise, and one is a manufacturer and the other an export facilitator, the spillover threat is minimal. *See* Export Trade Certificate of Review for U.S. Export & Trading Co. (USEX), Applic. No. 83-00024, at 2 (Dec. 23, 1983) (USEX may enter into agreements with Brownline Pipe Company, Inc.).

Another company that will act as an export intermediary dealing in a varied product line is the Trade Development Corporation of Chicago (TDCC). *See* Export

A noncertified exporter should be careful in structuring its export arrangement to avoid possible antitrust liability from the inference that sensitive domestic information is being exchanged among domestic competitors. The information exchange should be limited solely to information concerning export markets, and when feasible, exchanges of sensitive information should be limited to non-competitors in the domestic market. For example, this can be done by using an intermediary between buyers and sellers.¹¹⁷ When such limitations are not practical, an exchange of information should be made in the form of averages or in other summary form.¹¹⁸ Although a title III certificate is necessary to ensure certainty, an exporter that includes these limitations in its agreements can be reasonably confident that its activities will not be challenged on the basis of an unlawful exchange of information.

III. THE FORECLOSURE EFFECT: AN UNREASONABLE RESTRAINT ON EXPORT COMPETITORS

Foreclosure is the term used to describe the effect of conduct that reduces or eliminates the opportunities of export competitors.¹¹⁹ Fore-

Trade Certificate of Review for Trade Dev. Corp. of Chicago (TDCC), *Applic. No. 83-00012*, at 1-2 (Nov. 23, 1983). TDCC will provide consulting services to facilitate the export of any product for suppliers (United States manufacturer or supplier, its parent or subsidiary) that are operating in, or entering the Asian export market. *See id.* at 1. TDCC is allowed to advise the suppliers of products and services of relevant facts concerning the Asian export markets in order to assist them in planning sales strategies. *Id.* at 3. TDCC, however, is still subject to the standard provision prohibiting information exchanges. *Id.* Additionally, TDCC may disclose information resulting from its consulting services in the Asian market to suppliers of any product, again subject to the standard information exchange prohibition. *Id.*

117. *See, e.g.,* Export Trade Certificate of Review for VEXTRAC, Ltd., *Applic. No. 83-00036*, at 2 (Mar. 6, 1984) (VEXTRAC may solicit information from companies and will distribute the information separately to each prospective participant.); Export Trade Certificate of Review for United Export Trading Ass'n (UETA), *Applic. No. 83-00023*, at 3 (Feb. 21, 1984) (UETA may collect information from, and discuss and communicate information with, two or more members regarding competitive conditions or other facts relevant to the scale of products in the export market.).

118. *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 584-86 (1925); Export Trade Certificate of Review for VEXTRAC, Ltd., *Applic. No. 83-00036*, at 2-3 (Mar. 6, 1984). Another method by which the exchange of information can be accomplished with little risk of collusion is delineated in the Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), *Applic. No. 83-00004* at 1-2 (Oct. 25, 1983) (the company will set purchase prices and allocate export orders among its member processors through a sealed bid procedure or a rotating bid system in which the periodic purchases will be awarded to one or more of the member processors in turn or some combination of these two procedures).

119. 1 J. Atwood & K. Brewster, *supra* note 62, §§ 9.23-9.28 at 300; *see* Antitrust Guide, *supra* note 65, at 5; Brodley, *supra* note 63, at 1532; Fox I, *supra* note 63, at 76-77.

closure is significant because of the antitrust concern with maintaining free competitive access to markets for rival sellers.¹²⁰ Although foreclosure is a concern under title III,¹²¹ the ETCA contemplates, and the Guidelines specifically authorize, exclusive arrangements that foreclose trade opportunities in foreign markets of competing United States exporters.¹²² Arrangements of this type are deemed necessary to achieve the goals of the ETCA.¹²³ The same goals exist under title IV.¹²⁴ Because export activity under title IV lacks the statutory safeguards present in title III certification, however, a greater danger of antitrust violation exists under title IV. If foreclosure of export opportunities of United States competitors constitutes a direct, substantial and reasonably foreseeable restraint, the Sherman Act is violated.¹²⁵ In determining the seriousness of the foreclosure threat, therefore, certain factors must be analyzed. One commentator has suggested that such an analysis should center on the likelihood of predatory conduct¹²⁶ or on the effect the conduct will have on a competitor's supply of products or access to foreign markets.¹²⁷

If export activity operates to restrain the exports of non-participating firms, a foreclosure problem may exist.¹²⁸ Whether the foreclosure

120. See *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59 (S.D.N.Y. 1949). In *Alkali*, two Webb-Pomerene export associations agreed among themselves and with other foreign producers to allocate world markets in alkalis. *Id.* at 61-66. The court held that the defendants' conduct was an illegal restraint of the export trade of domestic competitors. *Id.* at 67 ("For as long as one rival of an export association sought to vend his wares in foreign territory, international agreements of the kind here involved could do naught but restrain his trade."). In four more recent lower court decisions, the courts focused on the foreclosure of the export opportunities of domestic competitors. See *Dominicus American Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 684-86 (S.D.N.Y. 1979); *Waldbaum v. Worldvision Enterprises, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378, at 76,255, 76,257-58 (S.D.N.Y. 1978); *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,783 (S.D.N.Y. 1977); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610, 622-24 (E.D. Pa.), *modified on other grounds*, 283 F. Supp. 586 (E.D. Pa. 1974).

121. See 15 U.S.C. § 4013(a)(1), (3) (1982).

122. See Certificate Guidelines, *supra* note 9, at 15,938.

123. Because exclusivity agreements can violate both the first and third certification standards by having an adverse affect on United States export competitors, 15 U.S.C. § 4013(a)(1), (3) (1982), such arrangements would not be authorized specifically if they were not considered an important element of successful export ventures.

124. The goal of both title III and title IV is to improve United States export performance. See House Report, *supra* note 9, at 1 (title IV); Senate Report, *supra* note 3, at 2 (title III).

125. See 15 U.S.C. § 1 (1982).

126. Zarin, *supra* note 9, at 348.

127. *Id.*

128. A major purpose of antitrust enforcement is to protect American export and investment opportunities against privately-imposed restrictions. Each United States-

is substantial or significant enough to deny certification will depend on several factors: the extent to which foreclosed competitors have access to other markets,¹²⁹ the amount of export commerce foreclosed,¹³⁰ the duration of the foreclosure,¹³¹ and the business justifications that may exist for the foreclosure.¹³²

based firm should be allowed to compete on the merits and should not be shut out by some restriction imposed by a competitor. Antitrust Guide, *supra* note 65, at 5.

129. In the international context, unless United States competitors would be foreclosed from access to so vital an outlet that collusion would be a dangerous risk, the Justice Department would not consider such foreclosure illegal. U.S. Dep't of Justice, Merger Guidelines, *reprinted in* 1 Trade Reg. Rep. (CCH) ¶ 4345 (Aug. 9, 1982).

130. In evaluating the extent of foreclosure, two factors must be considered: the share of the United States industry's total foreign commerce that is preempted and the significance of that foreign commerce to the total business of the industry. 1 J. Atwood & K. Brewster, *supra* note 62, § 9.28b, at 305. The crucial factors are the volume and relative share of the total amount of commerce foreclosed, rather than the size of the seller and the degree of foreclosure in separate markets. *Id.* at 305. For example, tying arrangements could foreclose a competitor's marketing opportunities both in the United States and in all export markets. Because the foreclosure would be complete, there would be no serious issue as to the relevant geographic market or the significance of the foreclosure. *Id.* at 305 n.11; *see* Heattransfer Corp. v. Volkswagenwerk A.G., 1975-1 Trade Cas. (CCH) ¶ 60,307, at 66,210 (S.D. Tex. 1974) (tying arrangement resulted in complete foreclosure of plaintiff's marketing opportunities). Foreclosure of foreign industrial consumers by tying arrangements or requirements contracts is probably more significant than foreclosure of distributive outlets because it may not be possible to sell at all unless an American exporter can sell to industrial consumers. 1 J. Atwood & K. Brewster, *supra* note 62, § 9.28b, at 305-06.

131. *See* Antitrust Guide, *supra* note 65, at 21.

132. The business justifications must be balanced against the extent of foreclosure caused by the restriction. The Justice Department recently announced additional guidelines to analyze the effect on United States competitors. Ryan, *supra* note 62, at 511. If all of the United States suppliers of a given product participate in the joint venture (or if all have a standing invitation to join), no joint venture antitrust problem should exist because no domestic competitor is being foreclosed. *Id.*; *see* Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Company, Inc. (Catfish), Applic. No. 83-00004 (Oct. 25, 1983) (example of transaction in which all suppliers participate); Sylvester, *Is There a New Tool in Antitrust*, Nat'l L.J., Dec. 19, 1983, at 8, col. 1 (virtually all the United States suppliers are participating in the Catfish joint venture). At the other factual extreme, if only one non-dominant supplier participates in the joint venture along with noncompeting suppliers, no antitrust problem should exist, regardless of the number of participants, as long as each participant accounts for only a modest share of the applicable United States and foreign markets. *See* Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2 (Oct. 25, 1983) (engineering firms are "substantially not in competition with each other"). It is the situation in between these two factual extremes that causes an antitrust problem; that is, when a joint venture of competing suppliers, comprising fewer than all competitors, possesses market power in the relevant market and engages in predatory conduct to the detriment of excluded competitors. Ryan, *supra* note 62, at 511 (quoting remarks of William F. Baxter before the Nat'l Ass'n of Mfrs. (May 10, 1983)); *see* Panel Discussion, *supra* note 82, at 155.

Title III addresses the foreclosure issue in both the first and third standards.¹³³ Under the first standard, conduct that has a substantial anti-competitive effect on United States export competitors will not be certified.¹³⁴ Under the third standard, conduct that unreasonably restrains the trade of United States export competitors will not be certified.¹³⁵ In determining what constitutes a substantial anti-competitive effect and what constitutes an unreasonable trade restraint, the Guidelines indicate that the goals of the ETCA should be considered.¹³⁶ Restraints that serve legitimate objectives under the ETCA

133. See 15 U.S.C. §§ 4013(a)(1), (3) (1982). In stating that conduct will be certified unless it has a substantial anti-competitive impact on the domestic market or on United States competitors, the Guidelines clarify the meaning of "substantial" by citing *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950). Certificate Guidelines, *supra* note 9, at 15,939 n.12. Legislative history suggests that Congress intended to clarify that only a substantial restraint of trade would be considered unreasonable. 127 Cong. Rec. S3631-32 (daily ed. Apr. 8, 1981) (remarks of Sen. Danforth). The Guidelines suggest that legislative history should be used when interpreting title III standards. See Certificate Guidelines, *supra* note 9, at 15,939 n.11.

134. See 15 U.S.C. § 4013(a)(1) (1982). A balancing approach should be used to determine the substantiality of the anti-competitive effect and the unreasonableness of the trade restraint. The balance is not always easy to achieve because often trade restraints are essential to achieve satisfactory penetration of a foreign market. 1 J. Atwood & K. Brewster, *supra* note 62, § 9.19a, at 295. Restraints that increase the flow of United States exports and enhance competition in the foreign markets may decrease competition in United States export commerce. *Id.* A joint venture can be defined effectively for antitrust purposes by focusing on the main factors that make joint ventures subject to antitrust concern—"the potential efficiency gains and anti-competitive risks of the joint enterprise." Brodley, *supra* note 63, at 1525. The advancement of export commerce "should be recognized as a legitimate objective of commercial conduct, and a restraint which serves that objective without undue limitations on the commercial freedom of others should be accepted as reasonable." 1 J. Atwood & K. Brewster, *supra* note 62, § 7.33, at 220.

135. The third standard prohibits unfair methods of competition against domestic export competitors. 15 U.S.C. § 4013(a)(3) (1982). When title III was passed, there was initial disagreement about whether, because the standard was based on the Federal Trade Commission Act (FTCA), *id.* § 45(a)(1), it should be construed by referring to judicial decisions that had interpreted the Act. See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). The Guidelines specifically reject this approach, noting that because the title III standard is narrower on its face and the policies and purposes underlying the ETCA are different from the FTCA, any judicial decisions interpreting § 5 of the FTCA "have only limited precedential significance." Certificate Guidelines, *supra* note 9, at 15,939.

136. See *id.* at 15,938-39. One of the goals of title III is to enable American exporters to compete against foreign competitors. See 15 U.S.C. § 4001(b) (1982). It is necessary to recognize that while excluding an export competitor from a market is objectionable because it may undermine competition and offend notions of fairness, it may be essential to the viability of a productive joint export venture. Brodley, *supra* note 63, at 1533-39. Commentators and the courts differ as to when market

should not be designated unreasonable merely because they restrain other domestic competitors. The Guidelines state that although export sales by a certificate holder displace sales of other United States exporters, this is not sufficient to deny certification, whereas the deliberate and unreasonable restriction of domestic export competitors from their source of supply might bar certification.¹³⁷ These examples directly apply to those exporters not certified under title III.

The Justice Department has indicated that the formation of "more or less" permanent joint ventures that have the potential to become "bottleneck monopol[ies]"¹³⁸ is an unreasonable restraint in the international context. An analogous situation in the domestic market occurs when a competitor is denied access to an indispensable or "essential facility."¹³⁹ If the essential facility doctrine applies to international transactions, then other competitors in that industry must be given access to the market on reasonable terms.¹⁴⁰

exclusion and discriminatory access are justified. *See, e.g.,* *Silver v. N.Y.S.E.*, 373 U.S. 341 (1963) (stock exchange precluded competitors from using wire services); *Associated Press v. United States*, 326 U.S. 1 (1945) (leading news wire service excluded competitors); *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (sports stadium possibly "essential facility" requiring access by competitors on equal terms), *cert. denied*, 436 U.S. 956 (1978); *Camco, Inc. v. Providence Fruit & Prod. Bldg., Inc.*, 194 F.2d 484, 488 (1st Cir.) (monopoly fruit and vegetable exchange denied access to wholesaler), *cert. denied*, 344 U.S. 817 (1952). *See generally* R. Bork, *The Antitrust Paradox* 333 (1978) (joint venture market exclusion rests on predatory use of an economy of scale); R. Posner, *supra* note 73, at 211 (access-mandatory remedies for joint ventures criticized as procedures requiring excessive judicial regulation); Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 Yale L.J. 218, 284 (1974) (access to be given as necessary to maintain equal competitive viability).

137. *See* Certificate Guidelines, *supra* note 9, at 15,939.

138. Antitrust Guide, *supra* note 65, at 22.

139. *Id.* at 21-22. The Antitrust Guide states that a facility is essential if its exclusion "imposes a serious handicap on other members of the industry." *Id.* For example, a joint venture that ties up the only available distributing facilities in a competitively significant market would constitute an essential facility. *See id.* at 47 n.80. By excluding or hindering exporters outside of the export venture from having access to an essential requirement, the venture may injure competition. Brodley, *supra* note 63, at 1532. *See* *United States v. Learner Co.*, 215 F. Supp. 603, 607 (D. Hawaii 1963) (foreclosure of Japanese export market precluded export sales by competing firms). The doctrine is not applied to a short-term consortium because "[i]t is unlikely that any particular short-term consortium is an 'essential facility'." Antitrust Guide, *supra* note 65, at 22.

140. *See* *Associated Press v. United States*, 326 U.S. 1, 17-18 (1945). Generally, the "essential facility" or "bottleneck monopoly" doctrine has been applied to permanent joint ventures such as those controlling a dominant stock exchange, *Silver v. N.Y.S.E.*, 373 U.S. 341, 347-49 (1963), a dominant national newsgathering service, *Associated Press v. United States*, 326 U.S. 1, 17-18 (1945), and a terminal railroad, *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 405-06 (1912).

Denying a competitor access to the venture may create a bottleneck if the export arrangement is more competitive than unilateral activity by an exporter in the export market. The Guidelines state that conduct will be more closely examined when few United States competitors in the export market exist and when the participants in the proposed conduct have a large market share.¹⁴¹ The combined market power of the exporter and the distributor is significant in determining whether the foreclosure is so substantial as to be unreasonable.¹⁴² Foreclosure also may occur when an export venture monopolizes an export market.¹⁴³ In order to determine what constitutes foreclosure, the relevant product and geographic markets must be delineated.¹⁴⁴

141. Certificate Guidelines, *supra* note 9, at 15,939. An analysis of the market structure in the United States for the goods and services to which the exporter's conduct applies is necessary in order to evaluate the likely anti-competitive effects in the domestic market. *Id.* ("The likelihood and severity of such effects may depend on the concentration of the relevant market(s), the ease of new entry and the market power of the applicant and its members."). A joint venture between competitors having market power will be closely scrutinized. Brodley, *supra* note 63, at 1535. In determining market power, "the aggregate market shares of each, as well as market shares of their parents, subsidiaries and affiliates, will be considered." Certificate Guidelines, *supra* note 9, at 15,939. Ordinarily the proposed conduct will be more closely scrutinized for possible anti-competitive impact when these markets are concentrated or when the participants have a large market share. *Id.*

142. Certificate Guidelines, *supra* note 9, at 15,939. Market power is defined as "the ability of a firm (or a group of firms acting jointly), to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable." Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981). Another approach to evaluating the extent of foreclosure is to consider other factors such as the share of the United States industry's total foreign commerce that is preempted and the significance of that foreign commerce in the total industry. See I. J. Atwood & K. Brewster, *supra* note 62, § 9.28b, at 305. The key factor is the volume and relative share of the total amount of commerce foreclosed rather than size of the seller and the degree of foreclosure in separate markets. See *id.*

143. Brodley, *supra* note 63, at 1532. If a joint export venture monopolizes an export market or the venture has natural monopoly characteristics and refuses to deal with export competitors, such a refusal may totally exclude the competitors from a market. *Id.*

144. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) ("[T]he threatened foreclosure of competition must be in relation to the market affected."). There are differing views on how to determine the relevant product and geographic markets. See, e.g., P. Areeda, *Antitrust Analysis* 239-40 (3d ed. 1981) (The relevant market includes "those suppliers—of the same or related product in the same or related geographic area—whose existence significantly restrains defendant's power. This process of inclusion and exclusion is spoken of as 'market definition.'"); Landes & Posner, *supra* note 142, at 960 ("[T]he usual legal procedure in an antitrust case in which market power is at issue is first to define a relevant market, then to compute the defendant's market share, and finally to infer the presence or absence of market power from that share.").

The Antitrust Guide states that, in some cases, foreclosure of a single national market may be determinative.¹⁴⁵ A wide range of market options, however, must be considered.¹⁴⁶ Because the objective of title III and title IV is to increase export trade, geographic markets should be broadly defined.¹⁴⁷ For the purpose of foreclosure, the definition of market should depend on the actual demand for products exported. The market, therefore, should reflect a multi-national demand for the product.¹⁴⁸ The foreclosure of a single national market may not be determinative when alternative export opportunities "abound."¹⁴⁹ If each national market were considered a separate geographic market, the threat of foreclosure could preclude exporters from using exclusivity arrangements.¹⁵⁰ Exclusivity arrangements may result in foreclo-

145. Antitrust Guide, *supra* note 65, at 47 n.80 ("If the exclusive arrangement means not only that the American exporter will not appoint any other distributor in the territory, but that the foreign distributor will not import goods for any other American manufacturer, . . . [it is] relevant whether the foreign distributor were such an important outlet in its own country that the product exclusivity feature of the agreement necessarily restricted in an important way the ability of other American firms to export to that market.").

146. See, e.g., 1 J. Atwood & K. Brewster, *supra* note 62, § 7.23, at 209 (foreclosure should be measured against aggregate foreign business opportunities); Landes & Posner, *supra* note 142, at 962-63 (elasticities of demand and supply as well as market share are relevant in assessing market power).

147. See 1 J. Atwood & K. Brewster, *supra* note 62, § 7.23, at 209.

148. In considering American foreign trade, foreclosure should be measured by taking into consideration all of the markets available to American firms, not simply a national market. See Address of William F. Baxter, Ass't Atty. Gen. Antitrust Div., before the Nat'l Ass'n of Mfrs. (May 10, 1983), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,447, at 56,051 (May 23, 1983) ("The intensity of competition at the international level in many areas has increased to the point where the relevant market, as that term is used in antitrust . . . is a worldwide market."). This is evidenced by the fact that most certificates include an export market that is worldwide, excluding only the United States and United States territories. See, e.g., Export Trade Certificate of Review for Texas First Intercontinental Trading Co., Applic. No. 83-00019, at 3 (Dec. 7, 1983); Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), DMT. No. 83-00009, at 1 (Nov. 15, 1983); Export Trade Certificate of Review for DPT World Trade, Inc., Applic. No. 83-00016, at 1 (Nov. 4, 1983).

149. 1 J. Atwood & K. Brewster, *supra* note 62, § 9.28b, at 305. Courts, however, have held that the foreclosure of a single national market is sufficient for an antitrust violation. See, e.g., *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1203-04 (9th Cir. 1975) (Sunkist found guilty of conspiring to restrain and monopolize the export of Arizona and California oranges to Hong Kong), *cert. denied*, 425 U.S. 959 (1976); *United States v. Learner Co.*, 215 F. Supp. 603, 606 (D. Hawaii 1963) (exports to Japan adopted as market when foreclosure of the market precluded export sales by competing firms).

150. 1 J. Atwood & K. Brewster, *supra* note 62, § 7.24, at 211. The Antitrust Guide states that it is relevant whether a foreign distributor is such an important outlet in its own country that the exclusivity arrangement necessarily restricts the ability of other American firms to export to that market. Antitrust Guide, *supra* note

sure when an American exporter appoints an exclusive foreign distributor and prevents another American competitor from selling in that territory.¹⁵¹ The Guidelines contain an underlying assumption that exclusivity arrangements are necessary to increase exports.¹⁵² Under title III, therefore, in most situations, an exclusivity arrangement may be deemed reasonable if increased exports result.¹⁵³

Exclusivity agreements are equally necessary to facilitate the trade activities of exporters operating without a certificate. As in dealing with the threat of spillover, it is beneficial for an exporter operating without a certificate to examine the certificates that have been issued under title III in order to anticipate foreclosure problems and to determine what type of agreements are permitted.

The certificate issued to the U.S. Farm-Raised Fish Trading Company, Inc. (Catfish),¹⁵⁴ permits conduct that raises traditional anti-trust concerns.¹⁵⁵ The certificate allows Catfish to market its fish directly or through intermediaries on an exclusive basis.¹⁵⁶ The Company may enter into agreements with the member processors that prohibit the members from exporting independently of the company,

65, at 47 n.80. Analogously, if each country were considered a separate geographic market and American firms were precluded from exporting to that market because of an exclusive foreign distributorship arrangement, the foreclosure of export competitors would be absolute. *See id.*

151. *See* Antitrust Guide, *supra* note 65, at 5.

152. *See* Certificate Guidelines, *supra* note 9, at 15,939. Courts will analyze the relevant market and the foreclosure effect of the exclusivity arrangement because the arrangement may be beneficial and have only a minor anticompetitive effect. 1 J. Atwood & K. Brewster, *supra* note 62, § 9.27, at 303.

153. The Guidelines explicitly authorize such arrangements. Certificate Guidelines, *supra* note 9, at 15,938.

154. Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), Applic. No. 83-00004 (Oct. 25, 1983). The Catfish certificate is unusual in that the Catfish Farmers of America, a trade association that includes almost all of America's catfish farmers, formed an export trading company to apply for a title III certificate. Scouton, *supra* note 98, at 24. More than 400 catfish farmers from 27 states are members. *Id.* at 23. The certificate issued to Catfish is "the best example so far of what the legislation was designed to do." Sylvester, *supra* note 132, at 8, col. 1 (statement of Kermit W. Almstedt, Sen. Fin. Comm. staffperson who helped draft the ETCA).

155. Such concerns include fixing export purchase and sales prices for its members and marketing its product through exclusive dealing arrangements. *See* Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), Applic. No. 83-00004, at 2 (Oct. 25, 1983). Because catfish farmers are domestic competitors, and their trade association includes both breeders and processors, the antitrust laws at one time prohibited them from participating jointly in foreign ventures. Sylvester, *supra* note 132, at 8, col. 1; *see id.* (quoting P. Anthony Roger, Esq.) ("Without the protections afforded by certification [the Catfish farmers] would not have made their move overseas.").

156. Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), Applic. No. 83-00004, at 2 (Oct. 25, 1983).

either directly or indirectly through other export intermediaries.¹⁵⁷ In analyzing the foreclosure problem arising from these exclusive marketing provisions, the significant factor in the Catfish arrangement is that virtually all of the American catfish farmers are members of this export company.¹⁵⁸ If all industry members are allowed to participate, no foreclosure problem can exist.¹⁵⁹ Frequently, foreclosure is not a serious threat because of the nature of the industry's product line.¹⁶⁰ For example, DMT World Trade, Inc. (DMT)¹⁶¹ is an exporter of construction and mining machinery.¹⁶² Under its certificate, DMT can enter into exclusive sales agreements with United States manufacturers and suppliers,¹⁶³ exclusive foreign distributorship agreements¹⁶⁴ and exclusive purchasing agent agreements.¹⁶⁵ Similar exclusive dealing arrangements are found in the certificate held by International Trailer Sales, Inc. (ITS),¹⁶⁶ an exporter of com-

157. *Id.*

158. See Sylvester, *supra* note 132, at 8, col. 1.

159. Ryan, *supra* note 62, at 711. Another example in which no foreclosure problems exist is the Export Trade Certificate of Review for U.S. Export Trading Co. (USEX), Applic. No. 83-00024 (Dec. 23, 1983). The USEX arrangement involved the cooperation of only two companies in a highly competitive product industry. See *id.* at 1-2. The likelihood that the exclusive selling and distributorship agreements would pose foreclosure problems, therefore, is more remote. See Certificate Guidelines, *supra* note 9, at 15,939 (conduct more closely scrutinized when market is highly concentrated).

160. If the product is both manufactured by many United States competitors and has a large worldwide demand, the threat of foreclosure is minimal. See Certificate Guidelines, *supra* Note 9, at 15,939; 1 J. Atwood & K. Brewster, *supra* note 62, § 928.b, at 304.

161. Export Trade Certificate of Review for DMT World Trade, Inc., Applic. No. 83-00016 (Nov. 4, 1983).

162. *Id.* at 1.

163. *Id.* at 2. In these agreements, "the manufacturer or supplier may agree not to sell, directly or through any other intermediary, into the export markets in which the DMT World Trade exclusively represents the manufacturer or supplier, or to any of DMT World Trade's competitors in export trade; [additionally,] DMT World Trade may agree not to represent any competitors of such manufacturer or supplier, unless authorized by the manufacturer or supplier." *Id.*

164. *Id.* DMT may "[e]nter into exclusive agreements with foreign representatives, (including agents, brokers, and distributors.)" *Id.* These agreements may provide that DMT will "deal in the export market only through its foreign representative; and . . . the foreign representative may agree not to represent [DMT's] competitors in the export market," unless so authorized by DMT. *Id.*

165. *Id.* DMT may "[e]nter into exclusive agreements with an individual buyer in the Export Markets to act as a purchasing agent with respect to a particular transaction." *Id.*

166. Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009 (Nov. 15, 1983).

mercial trailers and other construction equipment and export trade services.¹⁶⁷ The certificate allows ITS to enter into exclusive sales contracts and foreign distributorship agreements.¹⁶⁸ A significant difference between the certificate issued to DMT and the one held by ITS is that the latter has a time limitation of three years on the exclusive agreements.¹⁶⁹ Inclusion of such a time limitation means that the Commerce Department has to conduct little or no market analysis.¹⁷⁰ Furthermore, such a time limitation minimizes the possibility that "changed circumstances" will cause the export conduct to violate the title III standards.¹⁷¹

Because of the varied nature of the exporters' conduct and other factors such as the exporters' market strength, the certificates include standard provisions for arrangements that are both exclusive and nonexclusive.¹⁷² For example, a company may enter into any number

167. *Id.* at 1. These services include maintenance, safety, repair and other support services for its products, and export trade services such as consulting, international market research, product research and design exclusively for export, transportation and freight forwarding. *Id.* There seems to be little difference in the general types of product ITS and DMT sell, that is, a varied product line with a fairly open market and many competing suppliers, producers and buyers that ordinarily would indicate a very small possibility for foreclosure. See Certificate Guidelines, *supra* note 9, at 15,939.

168. Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009, at 2 (Nov. 15, 1983).

169. Compare Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009, at 2 (Nov. 15, 1983) (3-year time limitation) with Export Trade Certificate of Review for DMT World Trade, Inc., Applic. No. 83-00016 (Nov. 4, 1983) (no time limitation).

170. See Conrath, *supra* note 53, at 11.

171. Setting a time limitation on the immunity for certain export conduct is not the only way in which the Commerce Department has dealt with the problem of changed circumstances. All of the issued certificates include a condition that the exporter comply with requests made by the Commerce and Justice Departments for information or documents relevant to certified conduct. Although it may be possible to predict the concentration of a market for five or ten years, it is much more difficult to forecast for an indefinite period of time whether the factors that foster collusion will increase when the certificates include no time limitations. See Conrath, *supra* note 53, at 11. In the Export Trade Certificate of Review for United Export Trading Ass'n (UETA), Applic. No. 83-00023, at 6-7 (Feb. 21, 1984), the Commerce Department required an annual report. The report must include all domestic and export sales information. *Id.* If the total export sales of certified products and services exceeds \$1 million, the exporter must provide an itemization of export sales by product/service lines and geographical areas listed in the certificate. *Id.* The information in the report will enable the Commerce Department to monitor sales patterns and market share which may indicate either foreclosure or collusion.

172. See Certificate Guidelines, *supra* note 9, at 15,939. The exclusive arrangements in other certificates are very similar. For example, International Marketing & Procurement Services, Inc. (IMPS), is a company representing United States producers of sports and leisure equipment and services in the Middle East, Europe, the Far East, and Australia. See Export Trade Certificate of Review for Int'l Mktg. &

of nonexclusive agreements with United States suppliers and buyers in the export markets to act as a sales representative¹⁷³ or broker.¹⁷⁴ A company may enter into such agreements with suppliers whether or not the suppliers produce or sell similar equipment and services.¹⁷⁵ A company also may enter into agreements to serve as the exclusive sales representative and may agree not to represent any competitors of the supplier unless authorized by the supplier.¹⁷⁶ In return, the supplier agrees not to sell through any other intermediary, directly or indirectly, in the export markets in which the company exclusively repre-

Procurement Servs., Inc. (IMPS), *Applic. No. 83-00002*, at 3 (Oct. 25, 1983). Although there would seem to be little antitrust concern raised by IMPS' export conduct, IMPS' attorney stated that having its conduct certified has definitely changed the way IMPS does business abroad. Sylvester, *supra* note 132, at 8, col. 2. Similarly, a company now is permitted to sell groups of products together in what previously has been regarded as a tying arrangement. See *Export Trade Certificate of Review for Texas First Intercontinental Trading Co.*, *Applic. No. 83-00019*, at 4 (Dec. 7, 1983). A tying arrangement is defined as an arrangement that predicates the sale of one product on the sale of another. P. Areeda, *supra* note 144, at 732. Such arrangements can violate § 1 and § 2 of the Sherman Act. *Id.* at 733.

173. *Export Trade Certificate of Review for TWP Co., Inc.*, *Applic. No. 83-00030*, at 3 (Feb. 8, 1984) ("an intermediary who represents a Supplier of Products in the Export Markets and who, in so acting, offers, provides or engages in some or all of the Related Services"); *Export Trade Certificate of Review for Trade Dev. Corp. of Chicago (TDCC)*, *Applic. No. 83-00012*, at 4 (Nov. 23, 1983) ("an intermediary who represents a Supplier of Products and Services in the Export Markets and who, in so acting, offers, provides or engages in some or all Export Trade Services"); *Export Trade Certificate of Review for Int'l Mktg. & Procurement Servs., Inc. (IMPS)*, *Applic. No. 83-00002*, at 2 (Oct. 25, 1983) ("an intermediary who represents the Supplier in the Export Markets and who, in so acting, offers, provides or engages in some or all Export Trade Services").

174. *Export Trade Certificate of Review for TWP Co., Inc.*, *Applic. No. 83-00030*, at 3 (Feb. 8, 1984) ("an intermediary who represents a Supplier of Products in the Export Markets and who, in so acting, offers, provides or engages in some or all of the Related Services"); *Export Trade Certificate of Review for Trade Dev. Corp. of Chicago (TDCC)*, *Applic. No. 83-00012*, at 4 (Nov. 23, 1983) ("an intermediary who locates buyers of Products and Services in the Export Markets for Suppliers or who locates Suppliers of Products and Services for buyers in the Export Markets on a straight commission or cost-plus commission basis and who, in so acting, offers, provides or engages in some or all Export Trade Services"); *Export Trade Certificate of Review for Int'l Mktg. & Procurement Servs., Inc. (IMPS)*, *Applic. No. 83-00002*, at 2 (Oct. 25, 1983) "[a]n intermediary who locates buyers in the Export Markets for the Supplier or who locates Suppliers of Sports and Leisure Equipment and Services for buyers in the Export Markets on a straight commission or cost-plus commission basis and who, in so acting, offers, provides or engages in some or all Export Trade Services").

175. *Export Trade Certificate of Review for Int'l Mktg. & Procurement Servs., Inc. (IMPS)*, *Applic. No. 83-00002*, at 2 (Oct. 25, 1983).

176. *Id.* at 3.

sents the supplier.¹⁷⁷ If such sales do occur, the supplier agrees to pay a commission.¹⁷⁸

It is very important for exporters who are not exporting under title III certification to analyze the manner in which the Commerce Department has addressed the problem of foreclosure.¹⁷⁹ The certificates rely heavily on the use of restrictive provisions such as a time limitation, limitations on market share, or the establishment of a minimum number of firms that must be included in the export venture to limit the risk of foreclosure. Export arrangements that are similar to those described in the certificates may meet the jurisdictional threshold of title IV and may constitute antitrust violations because of the absence of statutory safeguards.

CONCLUSION

For decades, American businesses have asserted that United States antitrust laws hinder their ability to compete with foreign competitors in international markets. In the Export Trading Company Act, Congress attempted to clarify the antitrust liability of United States exporters in two ways. First, title IV clarifies the jurisdictional scope of the antitrust laws. Second, title III authorizes the granting of limited antitrust immunity for specified export conduct. The goal of both title III and title IV is the same—to increase United States exports. The

177. *Id.*

178. *Id.*

179. The export conduct certified thus far under title III crosses the entire spectrum of activities that pose the threat of foreclosure: allocations of markets, territories and customers, Export Trade Certificate of Review for TWP, Co., Inc., Applic. No. 83-00030, at 2-3 (Feb. 8, 1984); exclusive sales or marketing agreements, Export Trade Certificate of Review for Texas First Intercontinental Trading Co., Applic. No. 83-00019, at 4 (Dec. 7, 1983); refusals to deal, Export Trade Certificate of Review for Universal Trading Group Ltd. (UTG), Applic. No. 83-00005, at 3 (Nov. 28, 1983); exclusive foreign distributorship and marketing arrangements, Export Trade Certificate of Review for Int'l Trailer Sales, Inc. (ITS), Applic. No. 83-00009, at 2 (Nov. 15, 1983); agreements on price-fixing and resale price maintenance, Export Trade Certificate of Review for U.S. Farm-Raised Fish Trading Co., Inc. (Catfish), Applic. No. 83-00004, at 1-2 (Oct. 25, 1983); horizontal and vertical integration agreements, *id.* at 2; tying and requirements contracts, Export Trade Certificate of Review for Texas First Intercontinental Trading Co., Applic. No. 83-00019, at 4 (Dec. 7, 1983); and restrictions on membership, Export Trade Certificate of Review for Intex Int'l Trading Co., Inc., Applic. No. 83-00008, at 2-3 (Oct. 25, 1983). Such export activities engaged in without title III certificates make it difficult to determine when an export joint venture is lawful. "The ultimate legal result continues to turn on judicial characterization of a complex factual transaction, a situation that leads to uncertainty and costly proceedings." Brodley, *supra* note 63, at 1536.

antitrust immunity for specified export conduct. The goal of both title III and title IV is the same—to increase United States exports. The antitrust concern under both titles is also identical—to prevent a direct, substantial and foreseeable anticompetitive effect on United States commerce and United States competitors.

Title III certification permits exporters to structure their export conduct with certainty. The certificates also provide a valuable guide to non-certified exporters in identifying current antitrust concerns. Two such concerns on which the certificates focus are spillover and foreclosure. The certificates lessen the spillover threat from an exchange of business information among export competitors by delineating the specific exchange permitted, and the certificates ensure that conduct permitted does not substantially foreclose the export opportunities of domestic competitors. Finally, the certificates successfully balance protection of domestic commerce and domestic competitors against facilitation of American export trade.

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